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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

No. 783

HAROLD THOMAS HERMANSEN, ALIAS, FORD HERMANSEN,
Petitioner,
v.
UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

No._____

HAROLD THOMAS HERMANSEN, ALIAS, FORD HERMANSEN,
Petitioner,
v.
UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 6, 1956, and also to review the opinion of the United States Court of Appeals rendered on the motion for rehearing dated February 23, 1956, both opinions affirming the judgment of the District Court of the United States for the Southern District of Texas in favor of the United States of America.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit No. 15569 is attached to the appendix;

herein likewise the opinion of the United States Court of Appeals for the Fifth Circuit on Petitioners' motion for rehearing is attached to the appendix herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A., Rule 38-B in that there is an important question of local law involved and the opinion of the United States Court of Appeals is in direct conflict with applicable local decisions; also the opinion of the United States Court of Appeals is in conflict with a decision of the Supreme Court of the United States.

The statute involved in this case is 18 U.S.C.A., § 1341, which states as follows:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matters, any matter or thing whatever to be sent or delivered by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Questions Presented Urged as Reasons for Granting Petition

1. Whether a conviction will lie under 18 U.S.C.A., § 1341 when there existed no fraud at the time of the original transaction and when the mails were used subsequently thereto more than a month thereafter.

2. Where the conviction is based on the theory of a fraudulent scheme and the Circuit Court in its original

opinion sustained the theory of fraud, but in its opinion on the motion for rehearing apparently changes its opinion on the initial fraud and switches its theory to uphold the conviction on an attempted fraud and cites a decision to sustain its position which case is not based on an attempt at fraud but in which the facts show there was actual fraud.

3. Whether it is necessary to sustain a conviction for there to be an actual fraudulent scheme when the mailing takes place more than a month after the alleged transaction in question took place.

4. Whether or not the original transaction must be fraudulent to sustain a holding of intent to defraud.

To Be Urged If Petition Is Granted

1. That 18 U.S.C.A., § 1341 does not apply if at the time of the original transaction there has been no devise or attempt to devise a scheme or artifice to defraud and the mails were used subsequently more than a month after the transactions.

2. That the sale of a new motor vehicle with the paper license plates delivered without a certificate of title nevertheless gives good legal title to the innocent purchaser against any one in the world, unless the lien holder if there is one has registered his name on the manufacturers certificate before the innocent purchaser buys the motor vehicle, and the subsequent mailing to the purchaser of a false title certificate more than a month after the purchaser has taken possession of the motor vehicle so that the purchaser could procure his license, is not sufficient to constitute an offense under 18 U.S.C.A., § 1341.

3. That there can be no intent to defraud without having the ingredients of fraud in the transaction questioned.

The Judgment of the Court of Appeals

An appeal was taken to the United States Court of Appeals for the Fifth Circuit. On January 6, 1956, the United States Court of Appeals for the Fifth Circuit handed down their judgment and opinion. On February 23, 1956, the Court of Appeals handed down its opinion denying petitioner's motion for rehearing. The judgment and both opinions are attached as an appendix herein.

It is important to note herein that on Page 11 of the court's opinion, where the court discusses the question of fraud in the original sale of the automobiles, the court completely misinterprets Article 1436-1, *Vernon's Penal Code of Texas*, attached to appendix herein, in its interpretation under the case of *Motor Investment Company v. Knox City*, Texas Supreme Court, 174 S.W. 2d 482. The Fifth Circuit Court stated in its opinion as follows:

> "There is nothing in Motor Investment Company vs. Knox City, above cited, that says that the delivery by a dealer with his dealer's licenses can convey any better title than he has. It merely holds that if otherwise good, the mere failure to furnish a Texas title certificate does not prevent a valid sale by the dealer to the purchaser."

In the petitioner's motion for rehearing (copy of which is attached to Volume 3 of the transcript of the record in this case), it is particularly set out that the Circuit Court of Appeals for the Fifth Circuit erred in holding that the purchaser did not get better title than the seller under the facts and circumstances in the instant case.

The United States Court of Appeals for the Fifth Circuit in its opinion apparently reversed its position in regard to the good title obtained by the purchasers of the motor vehi-

cles in question and then went off on a point not involved in the case at bar, to-wit: The court cited *U. S. v. Calwer* (D.C. Mont., 292 Fed. 1007), which, as we will show in our brief, is not analogous or in any way could be the law in the case involved herein.

Reasons for Granting the Writ

For purposes of simplicity, petitioner joins together the four reasons urged for granting the petition. Following the Texas cases of *Motor Investment Company v. Knox City* and the other decisions set forth in your petitioner's motion for rehearing attached to Tr. Vol. 3, there can be no question whatsoever that the four purchasers involved in the case at bar at the time of their purchase received good, legal title to their motor vehicles, took delivery of their motor vehicles and paid their consideration a month or two before there were any mailings (Tr. 404, 480, 481, 496, 497, 507). The essential facts in this case are as follows:

The substance of the counts, as alleged in the indictment, was that Appellant sold certain motor vehicl. under false certificates of title that were sent through the United States mails (Tr. 11). The Appellant's theory was that he sold the automobiles involved in the indictment without any intent to defraud (Tr. 630-681-682-684); that the automobiles were new and contained paper license plates (Tr. 416-421-513); and that City Motor Sales, Inc., the seller, was a licensed dealer (Tr. 687); and that the purchasers received good title, notwithstanding Appellant's failure to file applications for certificates of title; and that one Radcliff Finance Company forged a number of applications (Tr. 615-616-621) for certificates of title showing liens on the respective automobiles that were purchased by

the parties named in the indictment, and Appellant claims that Radcliff Finance Corporation had no legal right to file the applications for certificates of title, but should have turned over the certificates of title to City Motor Sales, Inc., so that they could have been delivered to the purchasers named in the indictment; and that during the period immediately preceding the time necessary to take out licenses on motor vehicles, the Appellant, in order to protect the purchasers with licenses (Tr. 632), placed in the United States mails false certificates in order to get around the unauthorized liens filed by Radcliff Finance Corporation so that licenses could be procured for the customers pending a settlement with the Radcliff Finance Company, which Appellant claimed owed him considerable money, based on the pledging of $145,000.00 worth of notes (Tr. 676-677-678); and that Appellant had the (Tr. 632-633-634) *same attorney* as Radcliff Finance Corporation, and that the Appellant acted solely upon advice of counsel, and that negotiations were being made to eliminate the liens of the Radcliff Finance Corporation, but that Appellant meanwhile was assisting the purchasers named in the indictment to get licenses, even though Appellant had no legal obligation to do so after the sale of the automobiles (Tr. 683-684).

Count 2 *Darrell B. Thedford*
Car Sold (Exhibit G-14-c) October 31, 1953
Date of Mailing (Tr. 729) March 5, 1954

Count 12 *Grover W. Langford*
Car Sold (Exhibit G-18-b) January 10, 1954
Date of Mailing (Tr. 729) March 12, 1954

Count 18 *Jack Parker*
Car Sold (Exhibit G-21-b) December 12, 1953
Date of Mailing (Tr. 729) February 19, 1954

Count 28 *V. E. Birkman*
Car Sold (Exhibit G-25-b) December 6, 1953
Date of Mailing (Tr. 729) February 26, 1954

As can be seen from Page 11 of the court's opinion issued on January 6, 1956, the court did not agree that good title was obtained by the purchasers and thus had their legal basis of fraud. However, on the opinion in the motion for rehearing, attached to the appendix herein, the Appellate Court, while not specifically agreeing that it was wrong, apparently adopts the position of the petitioner that the Appellate Court was wrong, and then quoted the case of *Calwer*, 292 Fed. 1007, as authority for its point. The *Calwer* case is completely distinguished from the facts in the instant case because in that case there was a definite attempt to sell a false supernatural power, and the court merely held that the statute does not stipulate that the scheme or artifice of false pretense must be calculated to deceive persons of average intelligence.

The case at bar comes unquestionably under this Honorable Court's reasoning as set out in *Kann v. United States of America*, 323 U.S. 88, 89, Law Addition 88. In view of the *Knox City* case and other cases cited above which are fully set out in petitioner's brief on his motion for rehearing, certified to and attached to record, that the moment the petitioner made sales to the four purchasers involved in this case the sale became absolute and follows the *Kann* case wherein this Honorable Court found "the scheme in

each case had reached fruition". The persons intended to receive the money had received it irrevocably. It is immaterial to them or to any consummation of the scheme, how the banks which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

Similarly the case at bar in view of the *Knox* decision and the other Texas cases cited, the automobiles were irrevocably sold to the purchasers; the ultimate delivery of certificate of title was not *a condition* precedent to the sale of the automobiles; the sale was completed without the need of the seller procuring a certificate of title for the purchasers. Therefore, the case at bar does not come under the cases distinguished from the *Kann* case such as the use of mails as one step towards the receipts of the fruits of the fraud, *because the sale was completed and there was no fraud* and the fruits of the sale took place many months before the mailing took place. Also is the case at bar distinguished from the cases where the use of the mails is a means of concealment so that further frauds, which are part of the scheme may be completed. We take this last sentence from the *Kann* case in which this Honorable Supreme Court distinguishes from the *Kann* case a certain line of cases and in so distinguishes these cases let us again read the language of this Honorable Court:

> "also to be distinguished are cases when the use of the mails is a means of concealment so that *further fraud* which are a part of the scheme may be perpetrated."

The record in the case at bar which contains all the evidence is absolutely devoid of any attempt by your petitioner to make any sales after the mailing took place in

order to perpetrate a further fraud or any fraud. Consequently, the sale of the four automobiles not being a fraudulent sale nor an attempt of a fraudulent scheme and being completed several months before the mailing and only because the Finance Company and the seller were bickering about the accounts between the two parties (Tr. 676-677-678), and the petitioner herein learning that eventually new license plates would have to be obtained as that part of the season was now coming around (Tr. 632) thereupon sent through the mails false certificates in order to enable the four customers to procure their licenses. This was in no way connected with the sale. When the transaction is not fraudulent there can be no attempt at fraud. There must exist a possibility of a fraud and in the case at bar the petitioner was selling numerous automobiles accepting the money and delivering the motor vehicles to the innocent customers. Since under the laws of the State of Texas good legal valid title to the motor vehicle passed to the purchasers there was no fraud as of the date of the sales and therefore, the subsequent mailing some two or three months later could not bring this case under the mail fraud statute.

It is accordingly urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

William E. Ladin

WILLIAM E. LADIN

Counsel for Petitioner
425 Esperson Building
Houston 2, Texas

Copy of the foregoing brief has been served upon the United States by depositing the same with Hon. Gordon J. Kroll, Assistant United States Attorney, Houston, Texas.

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15569

HAROLD THOMAS HERMANSEN
ALIAS FORD HERMANSEN,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Southern District of Texas

(February 23, 1956)

ON PETITION FOR REHEARING

Before TUTTLE, CAMERON and JONES, Circuit Judges.

PER CURIAM: On motion for rehearing the appellant urges strongly that since, as he argues, the purchasers of automobiles from him under Texas law obtained good title

thereto, prevailing over the claims of the Radcliff Finance Corporation, there was no fraud in his use of the mails to obtain duplicate Texas certificates of title for them. This argument presupposes that 18 U.S.C.A. § 1341 requires the consummation of a fraudulent scheme, while quite the opposite is true. The statute provides:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The statute does not require that anyone actually be defrauded or even that a likelihood exist that someone be defrauded. *U. S. v. Calwer,* (D.C. Mont.), 292 Fed. 1007. The evidence here plainly warranted a finding that there was a scheme to defraud and that mailings were made pursuant thereto. This was sufficient to constitute the offense defined in the statute.

The motion is overruled.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15569

HAROLD THOMAS HERMANSEN
ALIAS FORD HERMANSEN,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Southern District of Texas

(January 6, 1956)

Before TUTTLE, CAMERON and Jones, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a conviction on four counts of an indictment of thirty-five counts for using the mails to defraud.[1]

The indictment alleged substantially the following scheme: That Hermansen devised a scheme and

[1] 18 U.S.C.A., §1341 and 18 U.S.C.A., §371.

artifice to defraud and obtain money by means of false and fraudulent pretenses and representations, which scheme was in operation and in the process of execution from on or about November 25, 1953, to March 25, 1954; that it was a part of said scheme that Hermansen and his wife would purchase automobiles in various parts of the United States by drawing authorized drafts on the Radcliff Finance Corporation, in Houston, Texas; that thereafter these vehicles would be transported to a used car lot in Rosenberg, Texas, known as City Motors Sales, owned and operated by the defendants; that thereafter the defendants would cause a chattel mortgage to be drawn reflecting Radcliff as first lien holder of said vehicle and an application for Texas title would be made which reflected such lien in favor of Radcliff, and which said application would be filed with the County Clerk and would in turn be mailed to the Texas State Highway Department in Austin, Texas, where the application was processed and after which the original title would be forwarded to Radcliff; that Hermansen's wife, a joint defendant, would proceed to the State of Mississippi and there obtain from proper authorities "Mississippi Road and Bridge Privilege Tax Certificates," which certificates would then be used to procure Texas certificates of title with identical descriptions of vehicles; that the said certificates described vehicles resembling those which had theretofore been purchased with money furnished by Radcliff and for which Texas title certificates had already been issued, but there would be a slight variance of motor numbers in the Mississippi certificates. Such Mississippi certificates appeared on their face to be issued either to Ace Motor & Implement Company, Mrs. H. T. Hermansen, or City Motors Sales Company; that by

all of such acts defendants became possessed of an apparently true, but actually fraudulent Texas certificate of title, which was identical with the true Texas certificate of title in possession of Radcliff, with the exception that the said fraudulent certificate listed a motor number which was slightly at variance with the true motor number, and the first lien of Radcliff was not shown on the fraudulent Texas certificate; that it was a part of said scheme to sell the said vehicles to innocent purchasers under said fraudulent certificates, and defendants would thereafter convert the entire proceeds of such sales to their own use without accounting to Radcliff; that for the purpose of executing and carrying out the scheme, the defendants did on certain dates (all prior to March 25, 1954) "unlawfully, knowingly and fraudulently cause to be placed in an authorized depository for mail matter, to be sent and delivered by the post office establishment of the United States a certain envelope addressed to the Texas State Highway Department, Austin, Texas, and containing a certain application for Texas certificate of title for one certain motor vehicle reflecting the motor number as being . . ." (here each count listed a motor number that corresponded with the number contained in the Mississippi certificate but otherwise described the automobile made the subject of a sale to a purchaser of an automobile having a number that differed as to one digit). The 35th count alleged a conspiracy.

At the conclusion of the government's case, the court dismissed all counts except counts 2, 12, 18 and 28. The jury found appellant guilty on these counts; the jury found appellant's wife not guilty. The court sentenced appellant to three years on count 2, three years to be served concurrently on count 12, and five years on counts

18 and 28, execution on the five year sentence to be suspended for a term of five years, and to pay a fine of $500 on count 2. A motion for new trial was timely filed and overruled.

The basis of appellant's appeal is the alleged errors of the court (1) in failing to hold that if there was a scheme, it was completed before any mailing took place; (2) in charging the jury with the theory of "lulling" because the indictment did not charge that appellant used the United States mail to "lull" any person; (3) in wrongfully charging the jury on the definition of "contemporaneous" in the state of the indictment and evidence; (4) in refusing to grant appellant's motion for acquittal on the ground that evidence showed that any scheme proven had been fully consummated before the mailing of the documents "since it appears from said evidence that the said alleged scheme was completely executed with respect to transactions in which defendants, or either of them, received money or anything of worth"; (5) in failing to grant a motion for acquittal on the ground of a variance between the evidence and the indictment; (6) in refusing to charge the jury with reference to the law of Texas to the effect that if the jury found that the automobiles involved bore a dealer's license, the purchaser obtained legal title thereto and the defendants could not have defrauded the purchaser and should be acquitted.

The evidence sustained the indictments as to the existence of an agreement between Hermansen and Radcliff whereby Hermansen drew a draft for the purchase of an automobile on Radcliff; and further as to the following facts: That Radcliff, under authority from Hermansen, made application to the proper Texas authorities for a certificate of title showing a first lien in favor of Rad-

cliff; that as to four of these automobiles Hermansen sold them to individuals who believed they were obtaining an automobile free and clear of all liens, and that Hermansen undertook to furnish a Texas title certificate for each of said automobiles, having obtained from each of the purchasers a signed application therefor; that Hermansen thereafter completed these applications by the use of the fictitious number contained in a Mississippi certificate obtained by his wife upon the giving of a motor number differing as to one digit only from that in the bill of sale to each of the four purchasers.

The proof further showed that the purchasers took their automobiles with a dealer's license plate, but when they later sought to obtain their own license plates they inquired from appellant as to the delay in the processing of their applications, and they were falsely informed that such delays were occasioned by the officials and not by reason of the inability of appellant to obtain a correct license because of the outstanding title certificate with a lien in favor of Radcliff. It was admitted by appellant that in March he did cause to be mailed the false certificates containing the fictitious motor numbers in order to obtain license plates for the purchasers.[2] He contended that he did this as an extra service to the purchasers, because an improper claim by Radcliff had in-

[2] Appellant's brief states this matter as follows:

"... during the period immediately preceding the time necessary to take out licenses on motor vehicles, the Appellant, in order to protect the purchasers with licenses, placed in the United States mails false certificates in order to get around the unauthorized liens filed by Radcliff Finance Corporation so that licenses could be procured for the customers pending a settlement with the Radcliff Finance Company, which Appellant claimed owed him considerable money, based on the pledging of $145,000.00 worth of notes."

terfered with the issuing of the current license plates. His defense was based upon his contention that there was a dispute between him and Radcliff as to the state of their account, and that Radcliff had made application for the Texas title for these automobiles without authority.

Appellant combines his argument on the first four grounds set out above on the theory that the evidence shows that in each transaction on which the jury found him guilty the automobile had been sold, the money received by Hermansen and if there was any fraud, it was completed before any mailing took place; in fact, he says (and the record bears this out) that all four sales had been completed before the first mailing took place; furthermore, appellant says there is no evidence that after any of these mailings he sold any automobiles to others under similar circumstances, that is, when a lien was being asserted by Radcliff.

However, the fact that the exchange of an automobile of bad or doubtful title in return for cash where the seller holds out that he is conveying unclouded title, knowing such representation to be false, and with intent to deceive the purchaser, before there is any use of the mails, does not prevent such use of the mails thereafter from being a violation of the statute if, in fact, the use of the mails, *whenever occurring*, is in furtherance of the scheme to defraud. *United States v. Reidel* (7 Cir.), 126 F. 2d 81.

The fact that a fraud had been completed one to three months before the mailing took place is no defense where, as here, the mailing was necessarily contemplated as an essential part of the sale of the car itself. The indictment charges that "the defendants would, and they did, sell the

said vehicles to innocent purchasers under the said fraudulent certificate of title." The proof showed that at the time the sale was made each purchaser signed an application for title certificate and left it with defendant; some witnesses testified that defendant specifically stated he would obtain a title for them. He actually obtained, through the use of the signed applications with the fictitious number inserted by Hermansen's agent, a license for a non-existent vehicle. Thus, it is seen that the jury was justified in finding that a scheme existed whereby the defendant sold "the said vehicles to innocent purchasers under the said fraudulent certificate of title," just as alleged in the indictment. It is immaterial that the money passed and the vehicle was delivered (with a dealer's license good for only 10 days) well before the false certificate was actually obtained. The sale was nevertheless *under* the fraudulent certificate. This being the case, the mailing of the signed applications, whenever it took place, was an essential part of the scheme. The mailing was not, as appellant contends, something he did as a favor to the purchasers. Appellant delivered each of the automobiles with a cardboard dealer's license attached to it. This was good for only 10 days. He was bound to have had some plan in mind to replace this license with an owner's plate. What he had in mind is clearly indicated by his action in taking from each purchaser a signed application blank. The jury must have found that what he had in mind was what he actually did thereafter; he would obtain a false Mississippi certificate, use it as a basis for filling out the signed application, and send it in to obtain a false license which he would deliver to the purchaser in accordance with his actual or implied agreement made at the time of sale.

In support of his contention that there was a fatal variance between the indictment and the proof, appellant first criticizes the court for charging the jury on the theory of "lulling" when the indictment does not set out that the appellant used the United States mails to lull any person.

What we have said above sufficiently answers the criticism of appellant that the mere lapse of from several weeks to four months between the act of selling the car and the mailing of the application for license, prevented the mailing from being in furtherance of the alleged fraudulent scheme. During the trial, evidence adduced by the government showed that the purchasers who had bought the automobiles on the representation by defendant that he would obtain a Texas license for them, repeatedly called on him to carry out this agreement. The evidence shows also that defendant made various excuses as to why he had not done so, followed finally by the mailing of the false applications. The gist of the offense in the indictment was the concoction of the scheme and the use of the mails in furtherance thereof. As we have already pointed out, there is sufficient evidence to justify the jury's finding that the mails were used for the purpose of executing and carrying out the alleged scheme. It is not necessary that the indictment allege in detail the reasons why any particular part of the scheme was included in it, so long as the indictment alleges enough so that the defendant is definitely informed of the charges against him so that he may present his defense and that he may not be surprised by evidence offered at the trial, and so that if convicted such conviction can be pleaded as res judicata. *Krueter v. United States*, (5 Cir.), 218 F. 2d 532. The evidence here authorized the jury to find that the reason why the accused included in his scheme the mailing of the

false certificates was to lull the purchasers into the belief that they were acquiring, or had acquired, a good title. Such proof was properly adjusted to the allegations in the indictment and no objection was made by the accused to the introduction of evidence tending to prove this fact. The charge of the court on this point was, therefore, without error.

The appellant next charges that there was a fatal variance by pointing out that whereas the indictment says City Motors Sales was at all times material to the indictment owned and operated by the defendant, the proof shows that City Motors Sales was a corporation. There is no merit in this contention.

Appellant next makes the point that the indictment charged "that thereafter the defendants would cause a chattel mortgage to be drawn reflecting Radcliff Finance Corporation as the first lien-holder of said vehicle"; whereas no chattel mortgages were introduced by the Government and there is no evidence that indicates that any chattel mortgages were drawn as to any of the automobiles in question. The weakness of appellant's argument as to this point is apparent when we consider the only argument made to support it. Appellant's brief says: "Therefore, the attempt by the government to show that the appellant was selling mortgaged property, and was, therefore, making a fraudulent sale, completely fails because no mortgage was introduced by the Government. . . ." The evidence clearly disclosed that there was a recorded first lien against the vehicles, this being recorded by its inclusion on the original title certificate issued by the state of Texas at the request of Radcliff under the authority given to Radcliff by Hermansen. The fact that such title certificate, being the only genuine title certificate

on the vehicles in question, was a necessary instrument in the passage of title from the purchasers and in the acquisition of their license plates, contained an entry showing a first lien in favor of Radcliff, created as much of a cloud on the title to the automobiles as though a chattel mortgage had been executed and filed. Furthermore, Hermansen's testimony repeatedly tells of a "floor plan" arrangement which he had with Radcliff. He testified that when he bought a car Radcliff advanced the money under an arrangement which enabled Radcliff to hold the "title." He also testified that during the period of time covered by the alleged scheme he was selling cars all the time and he was "having a hard time delivering titles"; that sometimes there would be "as much as two or three months' delay in delivering the titles." It was clear from his evidence that this was because Radcliff was holding the titles as security for the purchase price of automobiles which it had advanced. In view of the fact that the indictment otherwise correctly alleged that Radcliff sent the documents to the state of Texas for the issuance of the title certificates and that they were issued showing a first lien in favor of Radcliff, it is immaterial that the particular type of lien alleged in the indictment was not proven.

Appellant finally argues that there was no fraud in the sale of the automobiles because under the Texas statute a transfer of title by a dealer of a new car could be accomplished without such sale being predicated upon the delivery of a certificate of title. This argument is unavailing, because under the evidence appellant did undertake to deliver the new automobiles on his undertaking that he would furnish a valid certificate of title, and the proof also fully authorized the jury to find that the pur-

chasers were defrauded under a scheme or device concocted by appellant when they were sold automobiles carrying a dealer's cardboard license good for ten days only, when the seller knew that he could not perfect a valid Texas title under the then existing circumstances. There is nothing in *Motor Investment Co. v. Knox City* (Tex.), 174 S.W. 2d 482, that says that the delivery by a dealer with his dealer's license conveys any better title than he has. It merely holds that, if otherwise good, the mere failure to furnish a Texas title certificate does not prevent a valid sale by a dealer to the purchaser. Here the jury found the fraud existed when Hermansen purported to transfer a car that was free of all encumbrances and on which a Texas certificate of title could be obtained when he knew this to be impossible by reason of the outstanding lien in favor of Radcliff, as evidenced by the entry on the valid title certificate. We cannot reweigh the evidence on which the jury made this finding. Hermansen sought to explain the transaction differently. The jury could have, but did not, accept his explanation. Its verdict is supported by substantial evidence.

We find no error in the other challenged parts of the court's charge.

The judgment is

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of January 6, 1956

HAROLD THOMAS HERMANSEN ALIAS
FORD HERMANSEN,

VERSUS

No. 15569

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

VERNON'S PENAL CODE OF THE STATE OF TEXAS ANNOTATED

ART. 1436-1

Application for certificate of title before sale

Sec. 27. Before selling or disposing of any motor vehicle required to be registered or licensed in this State on any highway or public place within this State, except with dealer's metal or cardboard license number thereto attached as now provided by law, the owner shall make application to the designated agent in the county of his domicile upon form to be prescribed by the Department for a certificate of title for such motor vehicle.

VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED

ART. 6686.

Dealer's license; notice of sale or transfer; temporary license plates

(a) Any manufacturer of or dealer in motor vehicles in this State may, instead of registering each vehicle he may wish to show or demonstrate on the public highways, apply for registration and secure a general distinguishing number which may be attached to any motor vehicle or motorcycle which he sends temporarily upon the road. The annual fee for such dealer's registration of a general distinguishing number shall be Fifteen ($15.00) Dollars, and additional number plates bearing said number desired by any dealer shall be assigned and registered for a fee of Five ($5.00) Dollars each. A dealer within the meaning of this Article means any person, firm or corporation engaged in the business of selling automobiles who runs them upon the public highways or streets for demonstration for the purpose of sale; and his Act shall not be construed as permitting the use of a dealer's license or number place on any vehicle owned or used by such a dealer for any other purpose than demonstration for the purpose of sale. Every dealer in making application for a dealer's license shall apply for same in writing on a form-prescribed and provided by the State Highway Commission. The application shall state that the applicant is a dealer within the meaning of this Act, and if he holds a contract with an automobile manufacturer or distributor for the distribution or sale of motor vehicles or motorcycles he shall so state in the application, giving make of vehicle he handles and name of such manufacturer or distributor. The facts stated in such application shall

be sworn to before an officer authorized to administer oaths. No dealer's license or number plates shall be issued until this Article is complied with.

(b) Each dealer holding a dealer's license may issue temporary cardboard numbers using such dealer's number thereon which may be used by any person, dealer, or manufacturer purchasing a motor vehicle, trailer, or semi-trailer. Such person purchasing a motor vehicle, trailer, or semi-trailer from a manufacturer or dealer may use such cardboard number for a reasonable length of time but in no case to exceed ten (10) days after such purchase is made. Any dealer or manufacturer may use such cardboard license plates for the purpose of operating or conveying a motor vehicle, trailer, or semi-trailer from his place of business in one part of the State to his place of business in another part of the State, and for the purpose of operating or conveying a motor vehicle, trailer, or semi-trailer from the point where it is unloaded to his place of business, and may also use such cardboard number in transporting a motor vehicle, trailer, or semi-trailer from the State line to his place of business. The form of such cardboard number shall be prescribed by the Department of Public Safety.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 783

HAROLD THOMAS HERMANSEN, alias FORD HERMANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (Pet. App. 13-23) is reported at 228 F. 2d 495. The opinion on rehearing (Pet. App. 11-12) is reported at 230 F. 2d 173. The opinion of the District Court denying a motion to dismiss the indictment appears at pages 53-59 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1956 (Pet. App. 24). A petition

for rehearing was denied February 23, 1956 (Pet. App. 11-12). The petition for a writ of certiorari was filed March 22, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence establishes a scheme to defraud and mailings in execution thereof.

STATEMENT

Petitioner was convicted on four counts (2, 12, 18, 28) of an indictment returned in the United States District Court for the Southern District of Texas charging use of the mails in execution of a scheme to defraud (R. 8-11, 12-13, 23-24, 29-30, 758, 759). He was sentenced to concurrent sentences of three years on counts 2 and 12, and a fine of $500 on count 2. On the other two counts, sentence of five years was suspended with probation to begin at the expiration of the prison term (R. 759-761). On appeal, the judgment was affirmed (Pet. App. 24).

The scheme charged in the indictment (R. 8-11) was that petitioner would purchase cars by drafts on the Radcliff Finance Company and give the finance company a mortgage on the car; that the Texas title to the car, reflecting the finance company's lien, would be held by the finance company; that, by using a description which was accurate except for a slight variance in the motor number, petitioner's wife would obtain Mississippi titles to the cars which did not reflect the lien of the finance company; that, by means of the Mississippi titles, Texas titles would then be obtained which

did not reflect the lien of the finance company; and that "under the said fraudulent Certificates of Title" the cars would be sold to innocent purchasers for cash which petitioner would convert to his own use.

As to the four cars involved in the counts on which petitioner was convicted, it was shown that the cars, under their correct motor numbers, were subject to a floor plan chattel mortgage held by the finance company (R. 116-119, 123-124, 125-127, 137-138); and that the cars, under invoices bearing the correct motor numbers, were sold to purchasers for cash or a trade-in and cash (R. 402-404, 405-406, 408-409, 483-486, 475-476, 506-507) with dealers' license plates (R. 416, 481). In most cases the purchaser, at the time of sale, left at petitioner's place of business an application for a Texas certificate of title signed in blank (R. 414, 486, 513; see also R. 229-249) [1] Petitioner's wife, using various names, obtained Mississippi titles under slightly varying motor numbers (R. 180-181, 187-188, 190-191). Eventually, after considerable delay, the purchaser received a Texas title under the incorrect motor number on which no prior lien was shown (R. 405-407, 485-486, 477-478, 507-509). In each case, the purchaser did not learn of the error in the motor number until later, usually when the finance company asserted a lien on the car (R. 409-410; 489, 496, 479-480, 510-511).

The mailings charged and proved were mailings

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[1] In one case, involving a used car, the purchaser was told that title was mislaid and would be mailed (R. 478).

of the applications for Texas license plates which occurred after the cars had been delivered to the purchaser (R. 12-13, 23-24, 29-30, 40-41, R. 311-314, 318-320, 326-327).

When a purchaser inquired about the delay in receiving the certificate of title, he would be given some excuse (R. 406-408, 478, 509-510). When two purchasers asked about the finance company lien of which they learned after receiving the titles, petitioner said it was a mistake and would be cleared up (R. 410, 488-493). Only later, in May 1954, did petitioner inform purchasers that liens were being asserted on their cars (R. 705).

Petitioner admitted giving to purchasers Texas titles with incorrect motor numbers but claimed he did so because the finance company was improperly withholding correct title papers (R. 682-684, 701).

ARGUMENT

1. Petitioner suggests (Pet. 5-6, 8-9) that there was no fraud shown in this case, because, under Texas law, when he initially sold the cars with dealers' license plates, the four purchasers received good, legal title to their motor vehicles. We do not attempt to determine what the Texas law is on this subject, although it may be well to note that it can hardly be as clear as petitioner now asserts that the purchasers received full and good title, since he himself, in his motion to dismiss the indictment, argued that there was no fraud against the finance company because its lien was still valid (R. 50-53), and at the time of trial three of the

four purchasers were involved in litigation with the finance company (R. 410, 479, 496). The fact remains that the purchasers for cash were entitled to a car which was free of a law suit, whatever the ultimate outcome of that suit; that petitioner at the time of the sale knew that the finance company claimed a lien on the car sold; that he made no disclosure of that fact to the purchaser; and that an elaborate scheme was concocted to keep that information from the purchaser. The evidence of fraud is therefore plain.

2. Petitioner also argues (Pet. 7-9) that the mailings in connection with the applications for Texas titles, under the false motor numbers, were not in execution of the scheme to defraud since the mailings occurred after the cars had been delivered to the purchasers. The evidence is clear, however, that as to each purchaser the sale was not regarded as complete until title papers were delivered. An application for title was signed by the purchaser at the time of sale, or, in one case, a promise to mail the title was made at the time of sale (see the Statement, *supra*, p. 3). Since the dealings between petitioner and his purchaser were not ended until the purchaser received the Texas title, the mailings were in execution of each transaction between petitioner and his purchaser, and thus in furtherance of the scheme. Cf. *Clark* v. *United States*, 208 F. 2d 840 (C.A. D.C.), certiorari denied, 346 U. S. 865.

Moreover, it is evident that the giving of the false Texas titles enabled petitioner to stay in busi-

ness and that he did stay in business until May 1954 (R. 705, 716) after the mailings here involved. The mailings in this case, therefore, do not fall within the rationale of *Kann* v. *United States,* 323 U. S. 88, where the scheme had wholly come to an end. Rather, the mailings were a method, not only of completing the transactions with the purchasers, but also of preventing them from taking action and thus of enabling petitioner to continue in his fraudulent business. Cf. *United States* v. *Earnhardt,* 153 F. 2d 472 (C.A. 7), certiorari denied, 328 U. S. 858.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1956.

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